No. 12914

United States
COURT OF APPEALS
for the Ninth Circuit

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellant,*

vs.

KATHLEEN HUTCHENS, *Appellee.*

KATHLEEN HUTCHENS, *Appellant,*

vs.

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellee.*

PETITION FOR REVIEW BY APPELLEE HUTCHENS

Appeal from the District Court of the United States for the District of Oregon.

HON. GUS SOLOMON, *Judge.*

HARRY GEORGE, JR.,
EMERSON U. SIMS,
600 Henry Building,
Portland 4, Oregon,
WILLIAM A. BABCOCK,
Public Service Building,
Portland 4, Oregon,
Attorneys for Cross-appellant and Appellee.
JAMES ARTHUR POWERS,
1935 S. W. 12th Ave.,
Portland 1, Oregon,
For Appellant and Cross-appellee.

FILED
MAR 5 1952
PAUL P. O'BRIEN
CLERK

STEVENS-NESS LAW PUB. CO., PORTLAND 2-52

SUBJECT INDEX

TABLE OF AUTHORITIES

United States
COURT OF APPEALS
for the Ninth Circuit

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellant,*

vs.

KATHLEEN HUTCHENS, *Appellee.*

KATHLEEN HUTCHENS, *Appellant,*

vs.

C. D. JOHNSON LUMBER CORPORATION,
a Corporation, *Appellee.*

PETITION FOR REVIEW BY APPELLEE HUTCHENS

Appeal from the District Court of the United States for the District of Oregon.

HON. GUS SOLOMON, *Judge.*

I. MOTION FOR RECONSIDERATION

Comes now the Appellee Hutchens and moves the Court to reconsider its opinion and decision dated December 5, 1951, and to make a new determination in the matter for the reason that the Court has found that

to come within the scope of the Employers Liability Act of the State of Oregon it is necessary "that Hutchens at the time of his accident be an employee of someone engaged in the enterprise out of which the injury arose." Appellee contends this statement is erroneous. The point involved is of such magnitude and far-reaching importance and the Court's opinion indicates that there was such inadequate presentation of the matter on this point that it was not possible for the Court to be fully advised and, therefore, the duty of Appellee to request this review.

II. PERTINENT FACTS

A short review of the factual situation shows that the C. D. Johnson Lumber Company operated a log dump in connection with their sawmill and lumber business. That logs purchased by the company, together with their own logs, were received by the company at this log dump. That the unloading process was performed on the property of the company, and involved the use of heavy machinery owned and operated by the company by the company's specially skilled employees. The facts further show that the Logging Safety Code of the State of Oregon by law placed the responsibility of the safe operation of the log unloading machinery on the operator of the machinery. That the company by posted rules and business practices, made it a condition precedent to whomsoever delivered logs to this dump to subject themselves to the condition that the company would have the complete direction and control of the unloading work. That as a practical matter this was the most efficient and

safest manner to unload the logs. The facts further show that 20 different truck drivers unloaded approximately 80 different loads of logs daily at this unloading dump. Some were the company's employees, some were independent contractors' employees, and some were individuals unloading their own logs. All were treated the same and subjected to the same rules. The fact that under the Court's pronouncement Francis, if driving his own truck, would not be covered by the Act, but, if he allowed his employees to drive the truck, the employees would be protected, demonstrates a result that it is suggested a re-examination will resolve a less inequitable result.

At the outset appellee agrees with the opinion of the Court as to bearing the Guaranty Trust Company of New York vs. Grace W. York 326 U.S. 99, but point out that there is no Oregon Court decision that is squarely in point on all fours. This leaves the Court free to determine this question unfettered by State decisions. The fact that perhaps more than 90 per cent of all workmen are employees and, therefore, their court cases involve only those who happen to be employers should not confuse the issues. An exhaustive search of the cases shows many cases where the protection of the Act was denied the Plaintiff, but not a single instance appears where the coverage of the Act was withheld because the Plaintiff was not under a master and servant contract at the time his action arose.

The Court has apparently failed to consider the 1st part of Sec. 102-1601 covering the operation of machinery and the requirement of a system of communication be-

tween the operator of the machinery and the person doing the work, attention of which is called. Shulte vs. Pacific Paper Company 67 Ore. 334 hold that it is not necessary to allege that action was under this statute to justify its application where the complaint stated facts to which the rule of law embodied by the statute was applicable. Also see Dickerson vs. Eastern & Western Lumber Company 79 Ore. 281.

III. ARGUMENT

1. The Vice to Be Corrected by Act

The vice to be corrected was to stop the terrible maiming and killing of workmen because of unsafe working conditions over which they had no personal control. To accomplish this the "person in charge or control of the work" was required to "use every device, care and precaution" if the work was hazardous and if the work was construction, operation of machinery, or involved the use of electricity or dangerous appliances, detailed duties were imposed as enumerated in detail in the Act. The person to be protected was the workman who did not have the direction and control of the work or was not the owner, contractor, or person having charge of the work, but who was compelled to perform his work under conditions that he himself did not possess the power to control. He was while working not the master of his own destiny. Whenever he was the person in direction and control of the work, he was the one charged by the Act with the duty whether he was owner, contractor, foreman, independent contractor, or agent. If only workmen under a contract

of master and servant were to be protected, the Act could have made only "employers" responsible instead of owners, contractors, sub-contractors, coporations and persons whatsoever. No master and servant contract by the workmen is indicated. But the Act was passed to protect those workmen required to do their work under working conditions that they themselves are without power to control. The only rational explanation of the cases placing the protection of the Act on other persons' employees and not limiting the protection to the master and his own servants is that it covers workmen who have to subject themselves to hazards controlled by others than himself. Independent contracts are alone responsible because they are the ones having the control of the hazard.

3. Analysis of Act

The chart analysis shown heretofore is prepared to aid the Court in the requested review.

(a) Class Charged With the Duty by the Act

An analysis of Section 102-1601 shows that there are 5 classes of persons who are charged with the duty, provided they are engaged in performing certain designated activities. These persons are "owners," "contractors," "sub-contractors," "corporations" and "other persons," or "persons whatsoever." Appellant company is both "owner," "corporation" and "other person" or "persons whatsoever," which is admitted by all parties concerned.

These persons are charged with a duty only if engaged in one or more of the following activities:

(1) Constructing, repairing, altering, removing or painting bridges, viaducts or other structures;

(2) Erecting or operating machinery.

(3) Manufacturing or transmitting electricity.

(4) Manufacturing dangerous appliances or substances.

(5) Having charge of and responsible for work involving risk or danger to the employees or the public.

The appellant company is admitted to be one "operating machinery" and the uncontradicted evidence shows it to be one "having charge of and responsible for work involving a risk or danger" to the employees and the public. Therefore, the appellant company is one of the class that the Act places a duty upon.

(b) Duty Imposed by the Act

Without reviewing parts of the Act not involved in this case, it appears that "owners," "corporations" and "persons whatsoever" who are "operating machinery" or "doing work involving risk and danger to the employees" or both are charged with the duty as shown by the chart to do 15 different things, among which are the duties:

(1) To see that all dangerous machines are securely covered and protected to the fullest extent that the proper operation of the machinery will permit;

(2) That all machinery other than that operated by hand-power is, whenever necessary for the safety of the *persons* employed in or about the same for the safety of the *general public,* be provided with a system of com-

munication by means of signals, so that at all times there may be prompt and efficient communication between the employees or *other persons* and the operator of the motive power;

(3) To use every device, care and precaution practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure, machine or other appliances or devices, and without regard to the additional cost of suitable materials or safety devices. Stated shortly, the duties charged upon this appeallant company is to have a proper system of communication between the person working and the operator of the motive power and to use every device, care and precaution. Both duties are duties that are greater than that imposed by common law.

(c) Persons to Whom Duty Is Owed

If the Act is analyzed sentence by sentence to determine to whom is owed the duty by the "owner," "corporation" or "persons, whatsoever" or "other persons" while operating machinery unloading logs to have a "proper system of communication between the person and the operator of the motive power" and to "use every device, care and precaution," he find as follows:

The first mentioned in the context of the body of the section is an inference in connection with the use of metal, rope, glass, rubber, gutta percha, or other materials. No one is specified, so that it is a reasonable and fair inference that it would be the workmen who were required, in the course of their work, to use it. These workmen

could, conceivably, not be employees but the work generally has to be under the direction and control of the person so charged.

The next mentioned in the context of the body of this section in connection with scaffolding, where overcrowding is prohibited. No person is specified here either, but a reasonable and fair inference is that it is the "workers" who are required to use it.

The next reference is found in connection with the mandate for safety rails or scaffolds, to-wit: "To prevent any person" from falling. "Employee" is not named as such. "Person" again means "workman."

The next reference is a mandate as to the use of proper guards to protect from dangerous machines, to-wit: "that the proper operation of the machine permits." "Operation" implies "operator" who by this mandate, is the one who is supposed to be protected.

The next reference appears in the mandate as to the requirement that a communication system is necessary in operating machines "for persons employed in or about the same," that is, the persons doing work on or about the machine. No contract of master and servant is a condition precedent to the protection of the person working about that machine if engaged in the work that the owner is doing.

In the same connection of the duty of the signal system, it is extended to provide "for the safety of the general public". There is still no inference that the duty owed is only to persons under a master and servant con-

tract but concededly limited to workmen and members of the public engaged in a mutual undertaking with the party charged with the duty.

Following this we find that the communication system must be between the employees or *other persons* and the operator of the motive power. "Other persons" following "employees" must connote that "other persons" is different and not the same as "employees". In the instant case the "other person" was Dean Hutchens. The Act clearly does not require Hutchens to be proved to be under a contract of master and servant relationship as a condition precedent to being owed the duty declared by the Act of having a communications system between the operator and the motive power and himself. This is the first time that the word "employee" appears in the Act and the significance of the words "other persons" cannot be construed as the same or they would not follow so closely or used to distinguish someone other than "employee".

The next reference as to whom a duty is owed is in connection with the proper insulation of electric wires "where the public or employees of the owner * * * " transmitting or using the electricity might come in contact with it. Here again the bounds of statutory construction are not strained to conclude that "the public" "using electricity" is different from "employee" "using electricity". If the person's job, occupation, or work requires that he work so near or with the electricity-bearing wires that he may come in contact with them, he is owed the duty as to proper insulation by the transmitter of the elec-

tricity. It is the joint use that is engaged in that creates the duty of one to the other which the mandate of the Act covers.

Likewise, the mandate that dead wires shall not be mingled with live wires, infers that it applies to the protection of all persons or workmen whose job requires them to work with said wires in some mutual enterprise with the transmitter of the electricity.

The same applies as to the mandate that arms or supports bearing live wires shall be especially covered.

Likewise the mandate that "dangerous voltage wires" shall be strung at "such distance on poles or supports as to permit *repairmen* to freely engage in their work without danger of shock". "Repairmen" could conceivably be someone other than employee, yet the Act says he is protected. In certain areas, high voltage-carrying wire is strung on the same poles as are used by telephone and other uses. The mandate of the Act is to protect and make safe the "workers" other than the employees of the transmitter of the electricity in their work on the poles mutually used by the electric company and the others.

The final reference as to duty directs that the person having charge of and repsonsible for work involving a risk or danger "to the employees" "or the public" shall do certain things. The word "public" must mean something other and different from "employees" or it would not follow so closely. "Public", it is suggested, refers to those persons, not employees, who are workmen mutually engaged with the person having charge of and responsible for the work involving risk or danger. To pro-

tect him the Act places a duty upon the person in charge of and responsible for the work and requires that he use certain cares and precautions. The worker. The worker not being charged is at the mercy of the one in charge. The word "public" therefore, must mean those workmen who are engaged in a mutual undertaking with the person in charge. If the workman himself is in charge, then he can control and be responsible to see that the Act is abided by, but otherwise he must rely entirely for his safety and protection from the one in charge. There is no indication here that the workman has to be under a contract of master and servant to someone who may be miles away as a condition precedent to protection and otherwise the person in charge is excused from using every device, care and precaution which the Act makes mandatory.

In summary, the analysis shows that the persons to whom the one in charge of and responsible for work, or is operating the machinery, owes a duty to the "workers", implied, "persons", "operator" inferred, "persons employed in or about" that is, persons working in or about, "the general public", "other persons", "public", or "employees", "workmen" inferred, "repairmen", "employees", "the public", provided they are engaged with the person in charge in a mutual enterprise as designated by the Act. The word "employee" appears three times to distinguish other than "employees'. "Public" appears three times, to distinguish someone other than "employee". "Worker" and "repairmen" and "operators" all are different from "employees". It is manifest that the person doing the designated work or in charge of and responsible for work involving a risk or danger, is not excused from the duty

imposed on him by the Act if the injured party who is mutually engaged with him in performing the work is not under a contract of master and servant with someone.

To continue the search through the Act, *Section 102-1602* makes the person in charge and control of the work responsible, whether he happens to be a owner, a manager, a superintendent, or a foreman. This buttresses the contention that the intention of the Act is to insure the closest protection possible from the one in charge to the "worker" who to do his work, is exposed to the danger, thus showing the Act is not limited to those workers having only master and servant contracts.

Section 102-1603 places a penalty by fine of $10 to $1,000 or imprisonment of 10 days to one year, all persons in charge of the designated work who fail to see the requirements of the Act are complied with. This criminal statute was enacted for the protection of the workers exposed to the danger. The evidence and verdict of the jury shows that the company was the person in charge and violated the Act. Yet the holding of the Court will wash the hands of the person in charge and take from all workmen not under a master and servant contract at the time of injury, the protection of the Act. To require a log truck operator to hire a driver rather than to operate his trucks himself to be entitled to the protection of the Act is inequitable.

Section 102-1604, Who May Prosecute under the Act, is conspicuous by containing nothing to indicate that the deceased must have been an employee before his widow or heirs could recover in an action for a negligent death caused by the person in charge.

Section 102-1605 merely sets forth that if the injured party happens to be an employee, the usual "fellow servant" defense is withdrawn from the defendant.

Section 102-1606 sets forth that contributory negligence of the injured party is not a defense to the person in charge but may be considered in mitigation of the amount of damages.

Viewing the Act and how it came into being, it must be remembered that the referendum was prepared by the American Federation of Labor, a body of workmen, not lawyers. That the loose and layman use of the word "employee" is, to have it synonymous with "workmen" and without reference to the existence of a master and servant contract. The Legislation, being remedial for the protection of the workmen and laboring men and women, should be liberally construed to effectuate its purpose. The Factory Acts, the various Safety Codes, and this Act, is to regulate the conduct of the person in charge of and responsible for the work to see that workmen who may have no control or means to make safe the work are protected. Workmen should not be discriminated against by requiring that a master and servant contract must be proved before the person in charge of and responsible for the work owes him a duty to protect his safebeing.

IV. A PERSON WHO, BY LAW, IS CHARGED WITH AN ABSOLUTE DUTY TO ANOTHER PERSON OR THE PUBLIC CANNOT BY DELEGATING PERFORMANCE OF THAT DUTY TO AN INDEPENDENT CONTRACTOR, RELIEVE HIMSELF FROM LIABILITY FOR NON-PERFORMANCE OR NEGLIGENT PERFORMANCE THEREOF.

The foregoing rule is a general rule recognized by all and is found at 57 CJS, Page 365, under Master and Servant, Article 591.

It is clear from an analysis of the Act that the company is the operator of machinery and by conducting work involving risk and danger is subject to the Act. The law places the duty upon his shoulders by virtue of the work he is doing, and, therefore, he cannot by employing an independent contractor relieve himself from the responsibilities of this Act, which is an Act passed for the safety and protection of the public. This is not to be construed as an admission that Hutchins was an independent contractor which is most strenuously contend that he was not, but rather to indicate were he found to be an independent contractor, it would still not relieve the company of the duty laid down by the Act.

V. WHERE THE EMPLOYER INTERFERES WITH THE PERFORMANCE OF THE WORK AND ASSUMES CONTROL OR DIRECTION OF THE METHOD OF PERFORMING IT, THE ORIGINAL RELATION OF EMPLOYER AND INDEPENDENT CONTRACTOR IS CHANGED TO THAT OF MASTER AND SERVANT AND THE EMPLOYER BECOMES LIABLE FOR INJURIES RESULTING FROM WRONGFUL OR NEGLIGENT ACT DONE IN PERFORMANCE OF HIS ORDERS OR DIRECTION.

The Court's attention is called to the above-entitled rule which is found at 57 CJS, Page 369, Article 593.

There was no question in this case but what the appellant company retained complete direction and control of the work while it was being performed. Thus, even if Hutchins were found to be an independent contractor, which appellee contends he should not be, it still would not relieve the company of the duty imposed upon it by the statute.

This is further demonstrated by citation at 57 CJS, 379, Art. 607, to the effect that "Ordinarily the contractee is not liable for injuries sustained by the contractor in the performance of a contract, but if the employer retains the right of control a different rule applies. * * * A contractee is liable for an injury occasioned by his own negligence or by the wrongful act of his building engineer in the course of the latter's employment."

The company by rule and in obedience to the State Safety Law, made it a condition precedent to working on their log dump that the company had and exercised complete direction and control of the unloading of the logs by their own servants. The company should not be excused from the duties imposed by the Act for the protection of working men just because the injured workman is not proved to be under a master and servant contract, and should not hold that he can get the protection of the Act only when there is a master and servant relationship.

Further analysis of Oregon decisions will not be repeated here, but if the citations in appellee's brief heretofore filed are reviewed, it will be found that there is repeated reference in regard to those to whom the Act protected, to such persons as persons working around high voltage wires, persons engaged in certain work, other persons, workers in hazardous employment, repairmen, and the public, all words that are used to differentiate the workman from that of an employee.

And therefore, it seems amply evident that the Oregon Court has never at any time attempted to lay down such a rule as would state that only those under a master and servant contract were protected by the Act, as this would eliminate a vast army of workmen that the Act was passed to protect.

SUMMARY

There is no case on all fours with the instant case so that the Court is not bound by any State Court decision on this particular point. Many plaintiffs in the past have been denied the protection of the Act, but not one has been denied this protection because he was not under a master and servant contract when injured. The Court apparently has failed to consider the fact that the 1st part of Section 102-1601 creates a duty on the company as owner and operator of machinery in addition to the duty placed on them by virtue of the fact that they were engaged in work involving risk and danger. The Act was passed to protect workmen exposed to operating machinery owned and operated by another and to protect them when the work exposed them to risk and danger in hazardous industries where the workman was not in control or in charge of the work himself, but had to submit to the danger created by others. The company here was a member of the class charged with the duty of the Act by being an owner and a corporation and a person whatsoever that was operating machinery and responsible for work involving a risk and danger.

The duty of the company was to see that the machinery was properly guarded and that there was an adequate communication system between the persons working and the operator of the machinery. There is the further duty to protect life and limb of the workmen.

The persons to whom the duty was owed are shown to be persons, persons employed in or about, the general

public, employees, repairmen, operators, and workmen inferred.

The employer cannot excuse himself of a duty imposed by law by delegating his work to an independent contractor, and, further, if he were to have let his work to an independent contractor yet retains control and direction of the performance of the work, the status of the independent contractor is changed to that of master and servant in the eyes of the law.

For the foregoing reasons, it is submitted that the Act should not be limited to only those who at the time of the injury were under a contract of master and servant.

Respectfully submitted,

HARRY GEORGE, JR. and
EMERSON U. SIMS,
Attorneys for Appellee.